

ASSEMBLY BILL

No. 2162

Introduced by Assembly Member Niello

February 18, 2010

An act to amend Sections 1255.410 and 1255.450 of the Code of Civil Procedure, and to amend Section 625 of the Public Utilities Code, relating to eminent domain.

LEGISLATIVE COUNSEL'S DIGEST

AB 2162, as introduced, Niello. Eminent domain: public utilities.

(1) Under existing law, the Public Utilities Commission has regulatory authority over public utilities, including gas corporations, as defined. The existing Public Utilities Act prohibits any gas corporation from beginning the construction of, among other things, a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require that construction (certificate of public convenience and necessity). Existing law authorizes certain public utilities to condemn property, as prescribed, but prohibits specified public utilities that offer competitive services from condemning any property for the purpose of competing with another entity in the offering of those competitive services, unless the commission finds, pursuant to a petition or complaint filed by the public utility, in accordance with specified provisions that such an action would serve the public interest.

This bill would provide that the existing prohibition upon specified public utilities condemning property if they offer competitive services does not apply to a gas corporation seeking to develop a natural gas storage facility in a natural gas reservoir if the issue of the need for the

storage project at the proposed location was litigated in an evidentiary hearing before the commission pursuant to an application for a certificate of public convenience and necessity.

(2) The Eminent Domain Law provides the procedure for the exercise of the power of eminent domain by governmental entities and public utilities and authorizes the plaintiff to make an application to the court to take possession of property prior to judgment and sets forth the procedures the plaintiff must follow. Existing law authorizes a court to issue an order of possession upon an ex parte application by a water, wastewater, gas, electric, or telephone utility, as the court deems appropriate under the circumstances of the case, if the court finds that (A) an emergency exists and as a consequence the utility has an urgent need for possession of the property, and (B) an emergency order of possession will not displace or unreasonably affect any person in actual and lawful possession of the property to be taken or the larger parcel of which it is a part. Existing law authorizes a defendant or occupant of the property to move for relief from an order of possession issued on behalf of a utility because of an emergency and authorizes the court to modify, stay, or vacate the order upon consideration of the relevant facts and any objections raised, and upon completion of a hearing, if requested.

This bill would authorize a court to issue an order for possession upon an ex parte application by a water, wastewater, gas, electrical, or telephone utility if the court finds that (A) the commission has issued a certificate of public convenience and necessity for the project, (B) the issue of need for the proposed project at the proposed location was litigated through an evidentiary hearing before the commission pursuant to an application for a certificate of public convenience and necessity, and (C) the order of possession will not displace or unreasonably affect any person in actual and lawful possession of the property to be taken or the larger parcel of which it is a part. The existing right of a defendant or occupant of the property to move for relief would be applicable to any order of possession issued pursuant to this authority.

This bill would, in cases where property is being taken for the purpose of storing natural gas in a depleted natural gas field, require that the plaintiff serve a copy of the order for possession on the record owner of the property and on the occupants, if any, not less than 10 days prior to the time possession is to be taken pursuant to the order. The bill would provide that an order of possession may be served by mail upon an owner or occupant who previously appeared in or was provided with

notice pursuant to the notice procedures of the commission in a prior proceeding of the commission acting upon an application by the plaintiff for a certificate of public convenience and necessity as to the project for which possession of the property is required.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1255.410 of the Code of Civil Procedure
2 is amended to read:

3 1255.410. (a) At the time of filing the complaint or at any time
4 after filing the complaint and prior to entry of judgment, the
5 plaintiff may move the court for an order for possession under this
6 article, demonstrating that the plaintiff is entitled to take the
7 property by eminent domain and has deposited pursuant to Article
8 1 (commencing with Section 1255.010) an amount that satisfies
9 the requirements of that article.

10 The motion shall describe the property of which the plaintiff is
11 seeking to take possession, which description may be by reference
12 to the complaint, and shall state the date after which the plaintiff
13 is seeking to take possession of the property. The motion shall
14 include a statement substantially in the following form: “You have
15 the right to oppose this motion for an order of possession of your
16 property. If you oppose this motion you must serve the plaintiff
17 and file with the court a written opposition to the motion within
18 30 days from the date you were served with this motion.” If the
19 written opposition asserts a hardship, it shall be supported by a
20 declaration signed under penalty of perjury stating facts supporting
21 the hardship.

22 (b) The plaintiff shall serve a copy of the motion on the record
23 owner of the property and on the occupants, if any. The plaintiff
24 shall set the court hearing on the motion not less than 60 days after
25 service of the notice of motion on the record owner of unoccupied
26 property. If the property is lawfully occupied by a person dwelling
27 thereon or by a farm or business operation, service of the notice
28 of motion shall be made not less than 90 days prior to the hearing
29 on the motion.

30 (c) Not later than 30 days after service of the plaintiff’s motion
31 seeking to take possession of the property, any defendant or

1 occupant of the property may oppose the motion in writing by
2 serving the plaintiff and filing with the court the opposition. If the
3 written opposition asserts a hardship, it shall be supported by a
4 declaration signed under penalty of perjury stating facts supporting
5 the hardship. The plaintiff shall serve and file any reply to the
6 opposition not less than 15 days before the hearing.

7 (d) (1) If the motion is not opposed within 30 days of service
8 on each defendant and occupant of the property, the court shall
9 make an order for possession of the property if the court finds each
10 of the following:

11 (A) The plaintiff is entitled to take the property by eminent
12 domain.

13 (B) The plaintiff has deposited pursuant to Article 1
14 (commencing with Section 1255.010) an amount that satisfies the
15 requirements of that article.

16 (2) If the motion is opposed by a defendant or occupant within
17 30 days of service, the court may make an order for possession of
18 the property upon consideration of the relevant facts and any
19 opposition, and upon completion of a hearing on the motion, if the
20 court finds each of the following:

21 (A) The plaintiff is entitled to take the property by eminent
22 domain.

23 (B) The plaintiff has deposited pursuant to Article 1
24 (commencing with Section 1255.010) an amount that satisfies the
25 requirements of that article.

26 (C) There is an overriding need for the plaintiff to possess the
27 property prior to the issuance of final judgment in the case, and
28 the plaintiff will suffer a substantial hardship if the application for
29 possession is denied or limited.

30 (D) The hardship that the plaintiff will suffer if possession is
31 denied or limited outweighs any hardship on the defendant or
32 occupant that would be caused by the granting of the order of
33 possession.

34 (e) (1) Notwithstanding the time limits for notice prescribed
35 by this section and Section 1255.450, a court may issue an order
36 of possession upon an ex parte application by a water, wastewater,
37 gas, ~~electric~~ *electrical*, or telephone utility, as the court deems
38 appropriate under the circumstances of the case, if the court finds
39 each of the following:

1 (A) An emergency exists and as a consequence the utility has
2 an urgent need for possession of the property. For purposes of this
3 section, an emergency is defined to include, but is not limited to,
4 a utility's urgent need to protect the public's health and safety or
5 the reliability of utility service.

6 (B) An emergency order of possession will not displace or
7 unreasonably affect any person in actual and lawful possession of
8 the property to be taken or the larger parcel of which it is a part.

9 *(2) Notwithstanding the time limits for notice prescribed by this*
10 *section and Section 1255.450, a court may also issue an order for*
11 *possession upon an ex parte application by a water, wastewater,*
12 *gas, electrical, or telephone utility as the court deems appropriate*
13 *under the circumstances of the case, if the court finds each of the*
14 *following:*

15 *(A) The Public Utilities Commission has issued a certificate of*
16 *public convenience and necessity for the project, pursuant to*
17 *Chapter 5 (commencing with Section 1001) of Part 1 of Division*
18 *1 of the Public Utilities Code, for which possession of the property*
19 *is required.*

20 *(B) The issue of need for the proposed project at the proposed*
21 *location was litigated through an evidentiary hearing before the*
22 *Public Utility Commission pursuant to the application for a*
23 *certificate of public convenience and necessity.*

24 *(C) An order of possession will not displace or unreasonably*
25 *affect any person in actual and lawful possession of the property*
26 *to be taken or the larger parcel of which it is a part.*

27 ~~(2)~~

28 (3) Not later than 30 days after service of the order authorizing
29 the plaintiff to take possession of the property, any defendant or
30 occupant of the property may move for relief from an ~~emergency~~
31 *ex parte* order of possession that has been issued under this
32 subdivision. The court may modify, stay, or vacate the order upon
33 consideration of the relevant facts and any objections raised, and
34 upon completion of a hearing if requested.

35 SEC. 2. Section 1255.450 of the Code of Civil Procedure is
36 amended to read:

37 1255.450. (a) As used in this section, "record owner" means
38 the owner of the legal or equitable title to the fee or any lesser
39 interest in property as shown by recorded deeds or other recorded
40 instruments.

(b) The plaintiff shall serve a copy of the order for possession issued under Section 1255.410 on the record owner of the property and on the occupants, if any. If the property is lawfully occupied by a person dwelling thereon or by a farm or business operation, service shall be made not less than 30 days prior to the time possession is to be taken pursuant to the order. In all other cases, *including cases in which property is being taken for the purpose of storing natural gas in a depleted natural gas field*, service shall be made not less than 10 days prior to the time possession is to be taken pursuant to the order. Service may be made with or following service of summons.

(c) At least 30 days prior to the time possession is taken pursuant to an order for possession made pursuant to Section 1255.040, 1255.050, or 1255.460, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any.

(d) Service of the order shall be made by personal service except that:

(1) If the person on whom service is to be made has previously appeared in the proceeding or been served with summons in the proceeding, *or has previously appeared in or been provided with notice pursuant to the notice procedures of the Public Utilities Commission in a prior proceeding of the commission, acting upon an application by the plaintiff for a certificate of public convenience and necessity pursuant to Chapter 5 (commencing with Section 1001) of Part 1 of Division 1 of the Public Utilities Code, as to the project for which possession of the property is required*, service of the order may be made by mail upon that person and his or her attorney of record, if any.

(2) If the person on whom service is to be made resides out of the state, or has departed from the state or cannot with due diligence be found within the state, service of the order may be made by registered or certified mail addressed to that person at his or her last known address.

(e) ~~When~~ If the record owner cannot be located, the court may, for good cause shown on ex parte application, authorize the plaintiff to take possession of unoccupied property without serving a copy of the order for possession upon a record owner.

(f) A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

1 SEC. 3. Section 625 of the Public Utilities Code is amended
2 to read:

3 625. (a) (1) (A) For the purpose of this article, except as
4 specified in paragraph (4), a public utility that offers competitive
5 services may not condemn any property for the purpose of
6 competing with another entity in the offering of those competitive
7 services, unless the commission finds that such an action would
8 serve the public interest, pursuant to a petition or complaint filed
9 by the public utility, personal notice of which has been served on
10 the owners of the property to be condemned, and an adjudication
11 hearing in accordance with Chapter 9 (commencing with Section
12 1701), including an opportunity for the public to participate.

13 (B) The requirements of this section do not apply to the
14 condemnation of any property that is necessary solely for an
15 electrical-~~company~~ *corporation* or gas corporation to meet its
16 commission-ordered obligation to serve. Proposed exercises of
17 eminent domain by electrical or gas corporations that initially, or
18 subsequently, acquire property for either commission-ordered
19 electrical corporation obligation to serve and competitive
20 telecommunications services or gas corporation obligation to serve
21 and telecommunications services are subject to paragraph (2) of
22 subdivision (b). For property acquired through the exercise of
23 eminent domain after January 1, 2000, by an electrical or gas
24 corporation solely to meet its commission-ordered obligation to
25 serve, any electrical or gas corporation, or subsidiary or affiliate,
26 that intends to install telecommunication equipment on the property
27 for the purpose of providing competitive telecommunications
28 services shall provide notice for the planned installation in the
29 commission calendar.

30 (2) (A) Before making a finding pursuant to this subdivision,
31 the commission shall conduct the hearing in the local jurisdiction
32 that would be affected by the proposed condemnation. The hearing
33 shall commence within 45 days of the date that the petition or
34 complaint is filed, unless the respondent establishes that an
35 extension of not more than 30 days is necessary for discovery or
36 other hearing preparation. The commission shall provide public
37 notice of the hearing pursuant to the procedures of the commission
38 and shall also notify the local jurisdiction. In addition, the
39 commission shall provide the local jurisdiction with copies of the
40 notice of hearing in time for the local jurisdiction to mail that notice

1 at least seven days in advance of the hearing to all persons who
2 have requested copies of the local jurisdiction's agenda or agenda
3 packet pursuant to Section 54954.1 of the Government Code.

4 (B) For purposes of subparagraph (A), "local jurisdiction" means
5 each city within whose boundaries property sought to be taken by
6 eminent domain is located, and if property sought to be taken is
7 not located within city boundaries, each county within whose
8 boundaries that property is located. However, where there is more
9 than one local jurisdiction with respect to a single complaint or
10 petition, the commission shall provide notice and copies of notices
11 for mailing to all local jurisdictions involved, but shall hold only
12 a single hearing in any one of those local jurisdictions.

13 (3) (A) The assigned commissioner or administrative law judge
14 shall render a decision on making a finding in accordance with
15 this subdivision within 45 days of the conclusion of the hearing,
16 unless further briefing is ordered, in which event this period may
17 be extended by up to 30 additional days to allow for briefing.

18 (B) If the rendering of a decision pursuant to this subdivision
19 requires review under the California Environmental Quality Act
20 (Division 13 (commencing with Section 21000) of the Public
21 Resources Code), then the time limits contained in subparagraph
22 (A) of paragraph (2) and subparagraph (A) of *this* paragraph ~~(3)~~
23 shall be extended as needed to accommodate that review.

24 (4) This subdivision and Section 626 do not apply to a railroad
25 corporation, a refined petroleum product common carrier pipeline
26 corporation, ~~or~~ a water corporation, *or a gas corporation seeking*
27 *to develop a natural gas storage facility in a natural gas reservoir*
28 *if the issue of the need for the storage project at the proposed*
29 *location was litigated in an evidentiary hearing before the*
30 *commission pursuant to an application for a certificate of public*
31 *convenience and necessity.*

32 (b) The commission may make a finding pursuant to subdivision
33 (a) if, in the determination of the commission, either of the
34 following conditions is met:

35 (1) The proposed condemnation is necessary to provide service
36 as a provider of last resort to an unserved area, except when there
37 are competing offers from facility-based carriers to serve that area.

38 (2) The public utility is able to show all of the following with
39 regard to the proposed condemnation:

1 (A) The public interest and necessity require the proposed
2 project.

3 (B) The property to be condemned is necessary for the proposed
4 project.

5 (C) The public benefit of acquiring the property by eminent
6 domain outweighs the hardship to the owners of the property.

7 (D) The proposed project is located in a manner most compatible
8 with the greatest public good and least private injury.

9 (c) The commission shall develop procedures to facilitate access
10 for affected property owners to eminent domain proceedings
11 pursuant to this section, and to facilitate the participation of those
12 owners in those proceedings.

13 (d) Nothing in this section relieves a public utility from
14 complying with Section 1240.030 of the Code of Civil Procedure
15 or any other requirement imposed by law.

16 (e) A public utility that does not comply with this section may
17 not exercise the power of eminent domain, including, but not
18 limited to, any authority provided by Title 7 (commencing with
19 Section 1230.010) of Part 3 of the Code of Civil Procedure.

20 (f) The authority provided in this section supplements, and does
21 not replace or otherwise affect any other limitation in law on the
22 exercise of the power of eminent domain, including, but not limited
23 to, any authority provided by Title 7 (commencing with Section
24 1230.010) of Part 3 of the Code of Civil Procedure.

25 (g) (1) At the request of a public utility gas corporation, the
26 commission shall hold the local hearing required in subparagraphs
27 (A) and (B) of paragraph (2) of subdivision (a) and make and
28 certify the finding required by paragraph (1) of subdivision (a) as
29 part of the procedure to issue a certificate of public convenience
30 and necessity.

31 (2) Notwithstanding any other provision of law, if the
32 commission holds public hearings during the certification
33 procedure for the purpose of making the determination required
34 under paragraph (2) of subdivision (b), the commission shall have
35 an additional 45 days beyond the date of any otherwise applicable
36 statutory or regulatory deadline for making a determination.